STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

SWEETWATER UNION HIGH SCHOOL DISTRICT, Employer	)	
and	)	Case Nos. LA-R-27 LA-R-28 LA-R-696
CALIFORNIA SCHOOL EMPLOYEES ASSOCIATION, CHAPTER 471, Employee Organization	)	EERB Decision No. 4
and	)	November 23, 1976
SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 102, AFL-CIO, Employee Organization	)	

Appearances: Brown & Conradi by Gerald A. Conradi, Attorney, for Sweetheart Union High School District; William D. Dobson, Attorney, for California School Employees Association, Sweetwater Chapter 471; Anthony Butka, Research Director, Los Angeles County Employees Association, for Services Employees International Union, Local 102, AFL-CIO.

Before: Alleyne, Chairman, Gonzales and Cossack, Members.

OPINION

PROCEDURAL HISTORY

On April 1, 1976, Service Employees International Union, Local 102 (SEIU), filed with Sweetwater Union High School District a request for recogition as the exclusive representative of two units it described as a custodial-gardening unit and a transportation unit. Sequently, California School Employees Association, Sweetwater Chapter 471 (CSEA), filed an intervention seeking recognition as the exclusive representative of a unit it described as including all classified employees except bus drivers. SEIU next filed an intervention to the board unit seeking recognition as the exclusive representative of two additional units it described as an instructional aides unit and an office-technical and business services unit. All petitions and interventions excluded noon-duty supervisors and managerial, supervisory and confidential employees from the requested units.ss On July 26 and 27, 1976, a formal unit determination hearing was held before an agent of the Educational Employment Relations Board.

ISSUES

The first issue addressed at the hearing was whether any of the units proposed by SEIU and CSEA constitutes an appropriate unit for negotiating purposes under the Act.

The other two issues presented at the hearing were whether head custodians and school secretaries are "supervisors" within the meaning of the Act.

DISCUSSION

Appropriate Units

The sweetwater Union High School District has an average daily attendanace of approximately 29,227 students in grades 7 through 12 and adult school. There are 11 sites on which are distributed nine junior high schools, seven senior high schools, three adult education schools and one continuation school.[1] The district employs approximately 672 classified employees. The district's salary schedule for classified employees for administrative purposes divides the classified employees into nine job groups which are: accounting/purchasing/distribution, secretarial-clerical, duplications, instructional assistance, caferteria, custodial, gardening, transportation, and maintenance. It is from aa rearrangement of these groups that SEIU forms six suggested units. The unit proposed by CSEA includes all of the nine salary schedule groups, excepting the job positions of bus driver I and II which are in the "transportation" group.

Government Code Section3545(a) provides:

> 3545. (a) In each case where the appropriateness of the unit is an issue, the board shall decide the question on the basis of the community of interest between and among the employees and their established practices including, among other things, the extent to which such employees belong to the same employee organization, and the effect of the size of the unit on the efficient operation of the school district.

Relying principally upon past practices, CSEA takes the position that "historically...the CSEA has made salary proposals and handled the grievances for all classified employees..." SEIU emphasizes what it views as the absence of a community of interest among the employees in the comprehensive unit requested by CSEA, and stresses the presence of a seperate community of

[1]While the record is silent with respect to these facts, we take official notice of the information reported in the Annual Approtionments Report California State Department of Education, Form J-19 (July 1976).

interest among the employees within each of the four units it seeks.

Applying the statutory criteria to the facts of this case, we concluded tht appropriate bargaining units in this case are (1) and instructional aides (paraprofessional) unit, (2) an office-technical and business services unit, and (3) a unit, which for ease of reference wh shall describe as an operations-support services unit, consisting of all other classified employees. None of these units shall include noon-duty supervisors, for which neither party petitioned, nor managerial, supervisory or confidential employees.

I

We find that the board unit excepting bus drivers requested by CSEA is not an appropriate unit. The evidence does not require a decision in favor of this unit on the basis of established practices, community of interest or efficient operation of the school district.

CSEA presented evidence that before the Act became effective, it submitted wasge proposals to the employer's Board of Trustee which covered all classified employees. CSEA also showed that it had filed or was prepared to file grievances on behalf of any classified employee. At the time of the hearing CSEA has approximately 135 members among the classified employees. SEIU indicated that it is an employee organization recognized by the district, that it had filed a wage proposal with the district for fiscal year 1976/77, and that "Local 102 [does not have] any dues-paying members that are employees of the district."

The described activities of CSEA and SEIU are "established practices" within the meaning the Act. The occurred before passage of the Act and under the authority of the Winton Act.[2] The Winton Act enabled employee organization as the district "may designate" pursuant to "reasonable rules and regulations" to "meet and confer" with the public school employer.[3] It did not set forth criteria or procedures for determining appropriate units. On this record we do not know whether the rules and regulations adopted by the employer required an employee organization to represent all classified employees as a precondition to becoming a designated representative. Because of the unspecified and possibly unilateral nature of the unit designation procedure which existed in this district under the Winton Act, in determining appropriate negotiating units in this case we give little weight to "established practices" as they

[2]The Winton Act, Education Code Sections 13080-13090, governed employer-employee relations in public schools before passage of Government Code Sections 3545 et. seq.

[3]Government Code Sections 13085 and 13087.

relate to the composition of the unit represented under the authority of that Act.

The following discussions regarding the appropriateness of separate insturctional aides and office-technical and business services units will reveal the lace of a community of interest among the employees of the proposed board unit.

No evidence presented in this case regarding the efficient operation of the school district; however, this criterion will be addressed after discussion of the community of interest criteria.

II

The petition of SEIU for a unit of instruction aides includes in the unit the following job positions: instrumental music specialist, graphic art technician, aide to assistant principal, career center technician, community aide-adult school, cultural awarenesss facilitator, school-community relations facilitator, vocational workshop technician,m instructional aide, and instructional aide clerical. These job positions are identical to those listed in the employer's salary schedule in the job position of public information specialist from its petition apparently because the district has designated the position as confidential. The unit would consist of approximately 124 employees.

We decide in this case, as we decided in Pittsburg Unified School District,[4] that the instructional aides excepting the instructional aides-clerical, are a separate appropriate unit based upon a seperate and district community of interest.

In the present case, the job specifiecation of instructional aides show that, unlike other classified employees, their primary duties involve directly assisting in the educational development of students. Further, they are required to have at least a twelfth-grade education, generally including or supplemented by courses in thespeical area of education in which the aide is involved. Instructional aides are compensated 90 to 95 percent by categorical funding. With very few exceptions, the instructional aides work regular hours from 7:30 a.m to 4:00 p.m. They have a line of supervision distinct from other classified employees in that an aide is directly supervised by a classroom or resource teacher, next by the Principal and the coordinator of the categorically funded program through which they are employed, and ultimately by the District Superintendent and Board of Trustees.

The unique characteristics of the instructional aide employees relating to work function, educational requirements,

[4]EERB Decision No. 3, October 14, 1976.

compensation, work hours and supervision combined to establish that a separate instructional aides unit is appropriate.

As in Pittsburg, supra, we don not include the instructional aide-clerical in the instructional aides unit. The district job specification for the instructional aide-clerical states that while such employees may occasionally perform paraprofessional instructional activities, their major work function is to perform clerical tasks. Because, unlike all other aide classifications, the instructionnal aide-clerical is not generally required to interact with or work effectively and cooperatively with students and basically performs a clerical function, this job position is not included in the instructional aides unit.

III

The petition of SEIU for an office-technical and business services unit includes in the unit the following job positions: assistant purchasing agent, accountant, payroll supervisor, accounting technician, buyer, accountant clerk, financial clerk, secretary IV, secretary III, school secretary, secretary II, school clerk III/attendance, school clerk III/ library technician, school clerk III/registrar, secretary I, typist clerk III, school clerk II, typist clerk II, school clerk I, PABX operator/receptionist, typist clerk I, duplicating equipment operator II, duplications production technician and duplicating equipment operator I. These job positions are identical to those listed in the employer's salary schedule in the job grouping titled "accounting/purchasing/distribution", "secretarial-clerical" and "duplications", except the job positions of warehouseman which are in the "accounting/purchasing/distribution" group were not included in the petition. The unit would consist of approximately 200 employees.

We find that the office-techincal and business services employees constitute a separate appropriate unit based upon a separate and district community of interest.

The functions of the office-technical and business services are employees are generally to perform clerical and recordkeeping work rather than physical labor. These employees are required to type, operate business machines, maintain files and keep records. They are required to have at least a twelfth-grade education, sometimes supplemented by additionally courses in business or financial recordkeeping. Approximately 85 to 90 percent to these employees are compensated through the general fund. The remainder are largely categorically funded. The office-technical and business services employees work regular hours from 7:30 a.m to 4:00 p.m. They work in offices at the school sites or the district office. There are three lines of supervision for office-technical and business services employees which are distinct from the other clasified employees, each culminating with the District Superintendent and the Board of

Trustees. Clerical workers at the school sites report to the school Principal. Administrative clerks working at the district office in categorically-funded programs report to the program coordinator, the general director of the categorically-funded programs and the Assistant Superintendent of Instructional Services. Administrative clerks working at the district office for various departments report to the particular department head and the Business Manager.

The unique characteristics of the office-technical and business services employees relating to work function, educational requirements, compensation, work hours and supervision combined to establish that a separate office-technical and business services unit is appropriate.

In addition to the job positions listed in the petitioned filed by SEIU, this unit shall contain employees in the job position of instructional aide-clerical. As in Pittsburg, supra, we find that the job function of these employees is more akin to that of the employees in the office-technical and business services unit than those in the instructional aides unit.

IV

The classified employees remaining after the establishment of the instructional aides unit and the office-technical and business services unit are also the subject of the petitions filed by SEIU and CSEA. The petition filed by SEIU for a transportation unit requests the representation of the following job positions: maintenance mechanic II, foreman/heavy and light duty trans., transportation foreman and driver training vehicle operations, maintenance mechanic II/ heavy and light duty trans., bus driver II, and bus driver I. These job positions are identical to those listed in the employer's salary schedule in the job grouping titled "transportation." This proposed unit would consist of approximately 30 employees. The petition filed by SEIU for a custodial-gardening unit requests representation of the following job positions: head custodian, lead custodian, pool attendant, locker room attendant/custodian, custodian, gardener, and gardener-groundsman. These job positions are identical to those listed in the employer's salary schedule in the job groups titled "custodial' and "gardening." This proposed unit would consist of approximately 146 employees.

The other classified employees were the subject of the petition filed by CSEA for the board unit. Their job positions are those listed in the employer's salary schedule in the job groupings of "cafeteria" and "maintenance." Also included are the warehouseman and deliveryman listed on the salary schedule in the "accounting/purchasing/distribution" job group. In addition to the warehouseman and deliveryman, the job positions involved are the following: caferteria warehouse/deliveryman, cafeteria manager, baker, cook, cafeteria assistant, maintenance mechanic II foreman/plumbing, maintenance mechanic I foreman/ carpentry,

maintenance mechanic I foreman/painting, maintenance mechanic II leadman/audiovisual repair, maintenance mechanic II/audio-visual repairman, maintenance mechanic II/ electrician, maintenance mechanic II/ heating and air conditioning repairman, maintenance mechanic II/machinist, maintenance mechanic II/ office machine repairman, maintenance mechanic II/ plumber, maintenance mechaic I/ carpentry, maintenance mechanic I/ heavy equipment operator, maintenance mechanic I/locksmith maintenance mechanic I/metal fabricator, maintenance mechanic I/painter, general maintenance man, and utilityman. there are approximately 97 caferteria employees and 38 maintenance employees.

We find that neither the transportation unitnor the custodial-gardening unit suggested by SEIU is an appropriate separate unit in that neither has a community of interest separate and distinct from the other classified employees who remain after the establishment of the instructional aides and office-techical and buisness services unit.

The transportation employees have some characteristics which distinguish them from the other remaining employees. The bus drivers are required to possess a class II drivers license, medical certificate, California Highway Patrol school bus driver certificate, and a first aide certificate. They work a split shift from 7:30 a.m to 9:30 a.m and 1:30 p.m. to 4:00 p.m. They report to the transportation yard for work assignments. We find that these several distinguishing characteristics are not sufficient to establish a separate community of interest or separate appropriate unit for the transportation employees because, taken together, these characteristics do not substantially distinguish the transportation employees from the other remaining classified employees.

The custodial and gardening employees are different from the other remaining employees in that most of the custodians work evening shift from 2:30 p.m to 11:30 p.m. and they report to their assigned school site for work assignments. We find that these distinguishing characteristics are not sufficient to establish a separate community of interest or separate appropriate unit for the custodial-gardening employees because, taken together, they do not substantially distinguish the custodial and gardening employees from the other remaining classified employees.

The employees who remain after the establishment of the instructional aides and office-technical and business services units are the transportation, custodial-gardening, cafeteria and maintenance employees, and the warehouseman and deliveryman. Together they have a community of interest. The primary work functions of these employees all involve providing a proper physical environment and support services for students. They drive and repair buses, prepare meals for students, handle instructional equipment and supplies, and perform janitorial, gardening and general maintenance work. Generally they are not

required to have a twelfth-grade education. All except a possible few of these employees work full-time. The custodial-gardening and maintenance employees work a twelve-month year and the great majority of the transportation and cafeteria employees work a ten-month year. The maintenance employees work from 8:00 a.m to 4:30 p.m. and report to the maintenance yard for work assignments. The cafeteria employees work from 9:00 a.m. to 1:00 p.m. and report to work at their respective school sites. The cafeteria employees and warehouseman are the only employees who do not report to work at a location from which they are disbursed to various other locations for the actual performance of their job duties. While the cafeteria employees are compensated through a separate cafeteria account, all other employees are compensated wholly through the district's general fund. The transportation and cafeteria employees are compensated on an hourly bsis while the custodial-gardening and maintenance employees are compensated on a monthly basis. All employees work three or more hours per ay and therefore receive employer-paid fringe benefits.

Additionally, the transportation, maintenance and caferteria employees are supervised on a common scheme respectively by the Supervisor of Transportation, Supervisor of Maintenance and Supervisor of Food Service who each report directly to the Business Manager who in turn reports to the District Superintendent and Board of Trustees. The custodians and gardeners are supervised by the School Principal as well as the Supervisor of Maintenance, and again ultimately by the Business Manager, District Superintendent and Board of Trustees.

The district job specification indicated that the job function of the warehouseman is to be in charge of the district warehouse including supervising the receipt, storage, issuance and delivery of materials, stock and equipment. The district job specification indicates that the job function of the deliveryman is to receive, store and deliver school equipment and supplies, and to load, unload and drive vehicles used in delivering supplies and equipmet.

In this case, because neigher of the two units proposed by SEIU is separately appropriate, and because the custodial-gardening, transportation, cafeteria, maintenance worker, warehouseman and deliveryman together have a substantial community of interest, they are appropriately grouped in a single negotiating unit which we shall refer to as an operations-support services unit.

V

While no evidence was introduced at the hearing regarding the efficient operation of the school district, we have been mindful of the operation of this criterion with regard to the unit determination in this case. It is a legitimate concern that excessive fragmentation of negotiating units may burden an

employer with multiple negotiating processes and postures and with a variety of negotiated agreements difficult to administer because their provisions differ. Interorganization competition may increase demand made upon the employer by an employee organization. The employer may have to give the benefits of the "best" settlement in each area of negotiations to all employees to avoid employee unrest or the administrative inconvenience caused by multiple agreements.[5]

On the other hand, while a single unit is theoretically the most conducive to the efficient operation of the school district, it is only one of three criteria for unit determination set forth in Section 3545(a). Further, the purpose of the Act is stated in Government Code Section 3540 as follows:

> It is the purpose of this chapter to promote the improvement of personnel management and employer-employee relations within the public school systems in teh State of California by providing a uniform basis for recognizing the right of public school employees to join organizations of their own choice, to be represented by such organizations in their professional and employment relationships with public school employers, to select one employee organization as the exclusive representative of the employees in an appropriate unit...

This section recognizes to rights of public school employees to join and be represented by the employee organization of their choice. Implicit in this statement of legislative intention is the notion that the employees will have the ability to choose an organization which is an effective representative. An effective representative will generally be one largely determined by the community of interest andestablished practices of the employees rather than the efficient operation of the school district.

In this case, we find that the criterion of efficient operation of the employer should not preclude the establishment of the three units suggested by the community of interest criterion. This is especially so because no evidence was presented regarding efficiency of operations. As we stated previously, established practices have also been accorded little weight. The appropriate classified employee bargaining units are an instructional aides (paraprofessional) unit, an office-technical and business service unit and an operations-support services unit.

Supervisory Issues

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[5]Two articles which discuss the problem of the fragmentation of negotiating units are: Shaw & Clark. "Determination of Appropriate Bargaining Units in the Public Sector: Legal and Practical Problems," 51 Orgon Law Review 152 at 173 (1971); Rock. "The Appropriate Unit Question in the Public Service: The Problem of Proliferation," 67 Michigan Law Review 1001 (1969).

Government Code Section 3540.1(m) defines a supervisory employee as follows:

> "Supervisory employee" means any employee, regardless of job description, having authority in the interest of the employer to hire, transfer, suspend, layoff, recall, promote, discharge, assign, reward, or discipline other employees, or the responsibility to assign work to and direct them or to adjust their grievances, or effectively recommend such action, if, in connection with the foregoing functions, the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgement.

This section of the Actionis written in the disjunctive; therefore, an employee need notpossess all of the enumerated functions or duties to be a supervisor. The performance of any one fo the enumerated actions or the effective power to recommend such action is sufficient to make on a supervisor within the meaning of the Act.[6]

In Fire Fighters Union v. City of Vallejo,[7] the California Supreme Court held that, in the interpretation of language in a California statute, cognizance should be taken of the decision of the National Labor Relations Board interpreting identical or similar language in the Labor Management Relations Act.[8] In reaching our decision, we have considered the decisions of the NLRB and other state public employment relations boards.

The definition of supervisor in Section 3540.1(m) of the Act is virtually identical to the definition contained in Section 2(11) of the Labor Management Relations Act. However, other provisions of the Act regarding supervisors are significantly different from the LMRA. Specifically, Section 2(3) of the LMRA excludes supervisors from the definition of "employee" and therefore from the protection of the LMRA with regard to collective bargaining rights. On the other hand, Section 3540.1(j) of the Act does not excluded supervisors from the definition of "employee" and Section 3545(b)(2) allows supervisors to be represented in a negotiating unit separate from the rank and file employees they supervise.

This statutory scheme recognizes that public and private sector supervisors differ in the nature of the authority they

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[6]Ohio Power Co. v. NLRB, 176 F. 2d 385, 23 LRRM 1242 (C.A. 6, 1949), cert. denied, 388 U.S. 899.

[7]12 Cal. 3d 608 (1974).

[8]29 U.S.C. 152 (11). The Labor Management Relations Act amended the National Labor Relations Act in 1947.

possess. In the public school districts, decisions regarding hiring, firing, discipline and salaries of employees are generally ultimately reserved for decision-makers far removed from the employee's immediate supervision. This type of authority and the different California statutory scheme lend themselves to a broader construction of the definition of supervisor contained in the Act.

Head Custodians

The Board finds that the 18 head custodian in dispute are supervisory employees within the meaning of the Act and should be excluded from the operations-support services unit.

The record demonstrates that head custodians have the authority to effectively recommend the hiring of custodians. The Assistant Superintendent of Personnel Services testified that it is generally the practice to have the head custodian become involved in the selection of the custodial staff. A Principal testified that the initial hiring interview is conducted by himself and thereafter the applicant talks with the head custodian who gives a recommendation to the Principal. When asked if he placed a considerable amount of weight on the recommendation of the head custodian, the Principal stated "At this point he's never been wrong, so I would assume that he does quite well with it." Another head custodian stated that he and the Principal interview all applicants for custodial positions, that he discusses his recommendation with the Principal and the Principal follows his recommendation "99% of the time."

Since the head custodians' recommendations concerning hiring are consistently solicited and adopted by higher authority, we conclude that they have the authority to effectively recommend the hiring of custodians.[9]

Head custodians also have the authority to assign and direct the work of other employees, even though during the regular school year head custodians work the day shift from 6;30 a.m. to 3:00 p.m. while most of the employees under their supervision work the swing shift from 2:30 p.m. to 11:00 p.m. At the beginning of the shool year, each head custodian allocates regular work assignments to the members of the custodial crew. Although these assignments are forwarded through the Principal to the district business office, they are rarely altered by higher authority. A Principal testified tht he has changed the assignments made by a head custodian only two or threes times in 17 years. During the summer all custodian work together during the day and the head custodian personally oversees the work of the custodial crew. The work assignments are varied during this

[9]Chambersburg Area School District, 6 PPER 144, 146 (1975); Warren Rural Electrical Cooperative Co., Inc., 209 NLRB 325, 85 LRRM 1340 (1974).

period and are assigned on a daily basis by the head custodian.

When special events occur during the school year, the head custodian alters the regular assignment and assign specific additional tasks. Thes changes are usually made without consulting the Principal. Early each morning, each head custodian makes a round of inspection. If an evening crew member has not properly performed a task, the head custodian directs the evening crew chief or the crew member to correct the problem. It is the initial responsibility of the head custodian to ensure that improperly performed work is corrected; he consultes with the principal in the rare circumstance when he is unable to handle a problem himself.

The NLRB and other state public employee relations boards have consistently held that the authority to regularly inspect the work of other and to direct others to correct improperly performed work constitutes responsible direction of other employees in the performance of their work.[10]

In view of the authority of head custodians in the Sweetwater Unified School District to assign the work of the custodial crews, to inspect the work on a daily basis, and to direct necessary corrective action, we concluded that this authority constitutes responsible direction of other employees in the performance of their work.

The record amply demonstrated that head custodians perform several of the activities enumerated in Section 3540.1(m) of the Act and are, therefore, supervisors within the meaning of the Act.

School Secretaries

The Board finds that the 22 school secretaries in dispute are not supervisors within the meaning of the Act and should be included in the office-technical and business services unit.

School secretaries serve as secretaries to school Principals. They prepare communications, make appointments, maintain files, take dictation and do other tasks normally associated with secretarial functions.

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[10]Howard Johnson Company, 201 NLRB 376 (1973)

In Pennsylvania see: Bellefonte Area School District, 3 PPER 60 (1973); Northern Tioga School District, 3 PPER 107 (1973); Troy Area School District; 3 PPER 155 (1975); Forest Area School District, 3 PPER 264 (1974); Huntingdon Area School District, 5 PPER 33 (1974); Hatboro Horsham School District, 6 PPER 121 (1975); Chambersburg Area School District, 6 PPER 144 (1975); Claysburg-Kimmel School District, 6 PPER 309 (1975). In Indiana see: Merrilville Community School Corp. IPER 60 (1976).

The district presented evidence that the duties of a particular school secretary further involve in the occasional assignment of work to approximately eight other clerical employees. In these instances, the original assignment is made by the Principal to the school secretary who then delegates all or part of the assignment to whomever of the office clerical staff has the lightest workload and is available to lend assistanace. While she estimated that she devotes 10 percent of her time to what she terms "coordinating," her Principal testified that, "In general, however, day-to-day operation does not requre the school secretary to make specific work assignments." This school secretary also stated that she does not generally inspect the completed work of the other clerical employees. Finally, both she and her Principal agreed that she has been only unofficially designated by him as his "office manager" because he felt a need for his particular school secretary to "coordinate the efforts of the office." A second school secretary, who described her work as typical of that performed by approximately ten other school secretaries she knows, testified that she has never assigned work to other employees nor prepared work schedules.

The assignments made by the secretary who was designated "office manager" were made in a routine manner because she acted simply as a conduit in the transfer of work from the Principal to the most available clerical worker and because she did not inspect the work product. Thus, the evidence shows that, at best, some school secretaries only occassionally make rountine assignments to other employees in a manner not requiring the exercise of independent judgement.

The district also argues that school secretaries are supervisors because of their role in the hiring, evaluation and dismissal of other clerical employees. But the record shows that school secretaries have only minimal if any participation in these functions.

The Principal who testified stated that his school secretary sits with him at job interviews for clerical employees and assists himn in his decision to hire a particular person. It was not established that any other school secretaries participate in the hiring process in any manner.

While the same Principal testified that his school secretary assists him in his evaluation of the office clerical staff, the other school secretary testified that she has "never" been involved in the evaluation process.

The only evidence regarding dismissal auathority is the testimony of a Principal that on one occasion his school secretary recommended the discharge of a clerical employee. He did not follow the recommendation.

No evidence was presented regarding the other activities referenced in Section 3540.1(m).

The evidence does not demonstrate that the school secretaries perform any of the activities enumerated in Section 3540.1(m) of teh Act and they are threfore not supervisors within the meaning of the Act.

ORDER

The Educational Employment Relations Board directs that:

1. The following units are appropriate for the purpose of meeting and negotiating, providing and employee organization becomes the exclusive representative:

Instructional aides (paraprofessional) unit

Included: Instructional assistanace employees.

Excluded: Instructional aides-clerical, public information specialist, and all other employees, including managerial, supervisory and confidential employees.

Office-technical and business services unit

Included: Accounting/purchasing/distribution, secretarial-clerical, and duplications employees, and instructional aides-clerical.

Excluded: Warehouseman, deliveryman, and all other employees, including managerial, supervisory and confidential employees.

Operations-support unit

Included: Transportation, custodial, gardening, maintenance,and caferteria employees,and warehouseman and deliveryman.

Excluded: All other employees, including managerial, supervisory and confidential employees.

2. The head custodians are "supervisors' within the meaning of Section 3540.1(m) of the Act.

3. The school secretaries are not "supervisors" within the meaning of Section 3540.1(m) of the Act.

4. The employee organizations have the 10 workday posting period of the Notice of Decision in which to demonstrate to the Regional Director at least 30 percent support in the above units. The Regional Director shall conduct an electionat the end of the posting period if (1) more than on employee organization

qualifies for the ballot, or (2) if only one employee organization qualifies for the ballot and the employer does not grant voluntary recognition.

_Raymond J. Gonzales, Member Jerilou H. Cossack, Member

Date: November 23, 1976

Alleyne, Chairman, concurring in part, dissenting in part:

I agree with the conclusion of themajority that the three units described in the Board Order are appropriate, and with most of the factual analysis made in support of the finding. I do not fully agree with the manner in which they apply the applicable statutory-unit criteria. I dissent from the majority's conclusion that the Head Custodians in the Sweetwater Union High School District are supervisors within the meaning of the Act.

The Appropriate Units

I believe that this precedent-setting decision should contain more than it does in the way of guidance for future parties involved with issues like the appropriate-unit issue presented here. That is the limited basis for this concurring opinion on the appropriate-unit issue.

The standard set forth in Government Code Section 3545(a) requires consideration of traditional community-of-interest criteria plus consideration of the effect of unit size on the efficiency of the employer's operations, and the extent to which employees belong to the same employee organization. These are broadly worded standards, purposely made so by the Legislataure in order to cast upon this Board and the courts in California the task of giving the unit criteria meaning in concrete cases. One of the criteria, community of interest, has been the subject of interpretation in private sector cses involving the National Labor Relations Act (NLRA). It has also been interpreted by state appellate courts in California in cases arising under various newly emerging public sector labor laws in this State. The extent to which employees organize, as used as a criterion in Government Code Section 3545(a), is more difficult to understand since the NLRA and most public sector enactments contain the contrary mandate that extent of organization not be considered as a criterion in unit determination cases. Thus, it is not possible to rely upon cases interpreting those statutes for guidance in interpreting that aspect of Government Code Section 3545(a). The effect of unit size on the efficient operation of a school district is clear in expressing the general intention of the Legislature to avoid excessive unit fragmentation, but to

what extent and how this should be weighed as a factor in conjunction with the other unit criteria, and how generally each criterion should relate to the others cannot be known exept in the context of real cases. With that, I reach the conclusion reached by my colleagues through the following route.

Excessive unit fragmentation affects efficiency by burdening employers with a multiplicity of bargaining postures, each of which might arise at different times as different agreements are negotiated and administered at different times, possibly with different unions involved. On the other hand, a unit that is excessively large and insufficiently divided may have employees with conflicting employment interests which are adverse to their interest in effective representation. These conflicts stem from such matters as different methods of compensation, types of working conditions, lines of supervision, job qualifications, and differing degrees of integration or interchange with the work functions of other employees.

In the context of our Act, I view community of interest among groups of employees as an absence of conflicting employment interests adverse to effective representation. That is how I read the NLRB's decision in Kalamazoo Paper Box Corp.[11], which I regard as the most instructive case decided on the subject of community of interest.

I think that in each case requiring application of the board unit criteria contained in Government Code Section 35456, e must attempt to fashion a proper balance between the harmful effects on an employer of excessive unit fragmentation and the harmful effects on employees and the organizations attempting to represent them of a large and insufficiently divided negotiating unit or units.

In this case, I view the proposed CSEA unit of all classified employees, excluding bus drivers, as one that would produce conflicting interests between and among certain classes of classified employees. We decided in Pittsburg Unified School District[12], that paraprofessionals have a definable community of interest, distinct from other classified employees, and I join the majority opinion to the extent that it relies upon the Pittsburg decision as a percedent on the matter of Instructional Aides. Similar cases are appropriate decided in a similar manner.

Another potential for conflicting interests can be seen in this case by compaing the employment conditions of the office-technical and the remaining classified employees. I agree that the office-technical group is an appropriate separate unit. But

[11]136 NLRB 134, 49 LRRM 1715 (1962).

[12]EERB Decision No. 3, Case No. SF-R-106.

rather nthan stop, as does the majority opinion, with a recitation of the differences in employment conditions and a conclusion that the separate unit is accordingly appropriate, I would move from the noted differences in employment conditions to a conclusion that those differences are such that the inclusion of the office-technical group with other groups of employees would produce conflicting bargaining interests and impede the bargaining process.

I would similarly treat the remaining issue of whether of food serivces, custodial-gardening, transportation and maintenance groups should be combined in one unit or separated into two or more units, in concluding as we all conclude here, that those groups together are an appropriate unit.

I believe that once having considered the community-of-interest standard, the kinds of conclusions reached on application of that standard should be regarded as tentative and contingent upon consideration of the efficiency-of-operation and extent-of-organization criterion contained in Government Code Section 3545(a). The statute does not expressly require or expressly allow tht approach. But very few of the critical issues before the Board are capable of being resolve on the basis of a plain-meaning and literal reading of the Act. To consider the efficiency-of-operation criterion firstwould require the determination initially of the broadest of the statutory criteria, and, accordingly, the one least capable of being resolved by comparing facts in existing decisional law.[13] That being the case, the analysis ought to begin with the citerion most capable of being resolved on the basis of comparatively well-articulated general standards, such as those found in the Kalamazoo[14] decision. Further, I think the analysis should begin with the standard most likely to be the subject of another case with identical facts. When the standard more capable of being subjected as well-reasoned analysis is applied first, it might well be that community-of-interest findings dictate a number of units so small that no one would seriously regard impairmant of efficiency as a problem. It would then become unnecessary to apply the broader and more difficult criterion. This does not mean that community on interest ought to be given more weight than efficiency-of-operations; rather, I view this approach as a methodological one. It might well be that community-of-interest, when viewed alone, could require a large number of units, a number so large that it would not meet the efficiency test.[15]

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[13]Unlike the NLRA, most public sector statutes contain the efficiency-of-operations criterion. See e.g., affecting educational personnel, Section 10 of the Indiana Educational Employment Relations Act, GERR RF-104, 51:2315.

[14]Supra Note 1.

[15]The public sector statutes containing a criterion on excessive fragmentation were no doubt enacted with such extreme

In this case, neither the District nor any other party has asked us to consider the efficiency-of-operations criterion. Thus we are wholly justified in finding that the result reached on application of the community-of-interest criterion need not be changed on the basis of the effeciency-of-operations standard.

In considering "past history" as required by the "established practices" portion of Government Code Section 3545(a), I conclude, as does the majority that history predating this Act should be given little weight. In reaching that conclusion, I would take my analysis further than the majority's. I agree with my colleagues that the Winton Act contained no procedures for determining an appropriate unit. But there are further reasons why Winton Act history should be given little weight in our unit determination cases.

In Grasko v. Los Angeles City Board of Education,[16] the California Court of Appeal, in holding invalid a negotiated agreement between the Los Angeles City Board of Education and an employee organization, held that under the Winton Act "The Legislature has determined that binding written contracts or agreements hav no place in the field of labor relations between a public school employer and its employees."

Also, no exclusive-representative concept, as now recognized under the present Act, existed for education personnel. On the basis of all of these differences between the law before and after passage of the Act, I would give little weight to "established practices" predating this Act.

The extent to which employees belong to the same employee organization was not argued and for that reason is not properly before us as a criterion to be considered.

I would thus conclude on this reasoning that the finding required by the community-of-interest criterion, that three units are appropriate in this case, stands unrebutted following application of the remaining criteria, and that accordingly the three designated units are appropriate within the meaning of Section 3545 of the Act.

The Head Custodians

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examples in mind as New York City's 200 separate units, some with two employees, in teh late fifties; seventy-eight units in Detroit, a proportionately higher rate of proliferation than New York City's; and fifty units in Los Angeles County. See Rock, The Appropriate Unit Question In The Public Service, 67 Mich. L. Rev. 1001.

[16]31 Cal. App. 3d 290, 107 Cal. Rptr. 334, LRRM 3098 (1973).

I respectfully dissent from the majority conclusion that within the meaning of Government Code Section 3540.1(m), Head Custodians are supervisors and hence ineligible for inclusion in any of the units we find appropriate.

Government Code Section 3545 excludes "supervisory employees" from units containing nonsupervisory employees and also prohibits an employee organization from representing a unit of supervisors who supervise employees also represented by the employee organization. Government Code Section 3540.1(m) which is an almost exact replica of Section 2(11) of the National Labor Relations Act,[17] defines a supervisory employee as follows:

> "Supervisory employee" means any employee, regardless of job description, having authority in the interest of the employer to hire, transfer, suspend, layoff, recall, promote, discharge, assign, reward, or discipline other employees, or the responsibility to assign work to and direct them, or to adjust their grievances, or effectively recommend such action, if, in connection with the foregoing functions, the exercise of such authority is not of a merely rountine or clerical nature, but requires the use of independent judgment. (Emphasis added.)

The statutory requirement that a supervisor exercise one of the enumerated criteria in a manner that is not "rountine" or "clerical" and in a manner requiring the use of independent judgement is inescapably an essential part of the definition. I think the majority decision gives it virtually no effect.

Generally, the eighteen Head Custodians employed at various schools in the District work from 6:30 a.m. to 3:00 p.m., while the no more than five custodians each purportedly supervises work from 2:30 p.m. to 11:00 p.m. . Thus, for most of their shift, the Head Custodians have no one to direct. For 6:30 a.m. until 2:30 p.m., the Head Custodians do maintenance and repair work, a fact not mentioned in the majority opinion. Head Custodians strip and wax floors, install pencil sharpeners, repair desks, put in windows, unplug stopped sewers, and turn on air conditioners. The Head Custodian at Castlepark High School testified that with the exception of about one-and-a half hours a day he spends inspecting the work of the kind just described, he spends all his time doing maintenance and repair work. The Head Custodian at Montgomery Junior High School testified tht he spends the "bulk of his time" making repairs. The Principal at Bonita Vista Junior High School described the Head Custodians's limited inspection work as the inspection of "the kitchen area, the cooking area in the caferteria, the dining area, all lavatories and the [physical education] facilities for cleanliness...at the beginning of every day." The Head Custodian at Castlepark High School testified that if he saw that some of

[17]29 U.S.C Sec. 152 (11).

the night custodial work had not been done properly, and "if it wasn't too big a job", that, "I'd go ahead and do it right and then when the man came I'd let him know about it." The Gardener's shift and the shift of the Head Custodian are almost the same, but the Bonita Vista Junior High School Principal testified that the Head Custodian does not supervise the Gardener or inspect the Gardener's work.

The flaw that I see in the reasoning of the majority is the failure to acknowledge the undisputably routine nature of the work performed by custodians. This would not be relevant if the Head Custodians had the power to hire, discharge, discipline or reward custodians or adjust their grievances, or effectively make recommendations in those areas. But the School District does not seriously argue that the Head Custodians fit those portions of the supervisory criteria. The principal argument of the School District is that the Head Custodians meet the "assign" and "direct" criteria in the supervisory definition, and to the extent that the District relies on other supervisory criteria, District's arguments fail.

I think that if assigned or directed work is routine, then the assignment and direction of that work is rountine. It is undisputed that Custodians sweep, mop, wash and seal floors: they vacuum rugs and carpets, dust, wash and polish furniture and woodwork; they empty and clean wastebaskets; they wash windows, walls, sinks and fountains; they clean restrooms, sweep sidewalks, pick up papers, wash caferteria and eating areas, polich metal-work, fill towels and soap dispensers and replenish supplies; they replace light bulbs and tubes, clean blackboards and trays, turn lights on or off, lock doors, windows and gates and assist in moving, arranging and setting up furniture and equipment for special events; they stack and store furniture and equipment and assist in vandalism prevention and reporting. Their job description shows further that no experience is required to qualify for a custodial position and that custodians should have te ability to "work without immediate supervision."

I believe that this is routine work and that the direction of this routine work could accordingly be nothing more than routine. Thus, on the direction of work, the argument in favor of a supervisory status for Head Custodians suffers from evidence of the routine nature of the directed work as well as the brief daily period during which the Head Custodians have any opportunity to direct the custodians in any way. The same reasoning applies to the argument that the Head Custodians assign work in a manner that is not routine.

Once a year, at the beginning of each school year, custodial assignments are made. According to one Principal, the assignment, once set up by the Head Custodian on the basis of a map and custodial needs outlined in a manual prepared by the School District, are sent to the School District offices for approval, which, not surprisingly, is routinely granted every

year.

At one school, a Head Custodian's participation in evaluations is limited to a first-step written evaluation on a form. The Principal also completes an evaluation form. On completion of the two forms, the Head Custodian and the Principal meet, discuss their respective evaluations, and prepare a final evaluation which is signed by the Principal. The Head Custodian at another school testified that he completed an evaluation form and submitted it to the Principal, who did not discuss it with him. At still another school in the District, the Bonita Vista Junior High School, the Head Custodian, according to the Principal's testimony, does not prepare a written evaluation of employees. The Principal and the Head Custodian discuss the custodians' strong and weak points, but it is clear that the Principal decides what to place on the evaluation form whichhe prepares in writing and signs.

In any event, the evaluation of employees is not, alone, indicative of a supervisory status. In some cases it might suggest the power to discipline employees, but this record is lacking in evidence that Head Custodians discipline employees or even effectively recommend that employees be disciplined. The power to evaluation or to play a role with the Principal in the evaluation process, may suggest the power to direct employees. But the evidence recited established that the Head Custodians have no effective power to direct.

A secondary argument of the School District is that Head Custodians supervise by playing a role in the hiring process. The School District brief states that the Head Custodians "participates in the hiring process by interviewing prospective employees and by informing the Principal of the most desirable candidate." But the Bonita Vista Junior High School Principal testified that that the Principal conducts the initial hiring interview, following which the applicant is "invited" to visit with the Head Custodian for an interview, which is followed by a recommendation from the Head Custodian to the Principal, who in turn akes a recommendation to the Board of Trustees of the School District through the District Personnel Office.

It seems evident that in hiring, it is the Principal who makes aneffective recommendationto the School District, and that the Head Custodian is twice-removed from the final hiring authority in the School District. That is why, in answer to the single question of whether he hired employees, the Head Custodian at Montgomery Junior High School testified: "No sir." The same witness was asked whetyer he was ever involved in the dismissal of an employee. He answer, "Yes, I have been." He then described the one occasion of his involvement, as follows:

> Well, this guy was not getting his job done and he told the Principal one day that he should be the one sitting behind the desk instead of polishing it. The Principal was very

unhappy so the next day this guy asked me, he said, "How many weeks do I have to give you notice ... to quit?" I said, "Give me two minutes is all you've got to give me." So he said, "I'm giving you notice that I'm quitting." I said, "Well lets go to the Principal's office", and it didn't take the Principal along to get rid of him.

That is the sole evidence on the power of Head Custodians to dismiss or effectively recommend dismissal.

I

In Fire Fighters Union v. City of Vallejo,[18] the California Supreme Court held that it is appropriate to use National Labor Relations Act Precedents as a guide in interpreting analagous or identical language in state labor legislation. In Los Angeles Metropolitan Transit Authority v. Brotherhood of R.R. Trainmen,[19] the California Supreme Court said:

> When legislation has been judically construed and a subsequent statute on the same or an analagous subject is framed in the identical language, it will ordinarily be presumed that the Legislature intended that the language as used in the later enactment would be given like a interpretation. This rule is applicable to state statutes which are patterned after federal statutes... (Emphasis added.)

In Alameda County Assistant Public Defenders Association v. County of Alameda,[20] and Santa Clara County District Attorney Investigators Association v. County of Santa Clara,[21] the California Court of Appeal relied on NLRB precedents in unit-determination cases.

While Vallejo alone might well be read as suggested but not requiring that NLRA precedents be followed in analagous-language cases, it seems clear that the combination of (1) Vallejo, (2) Los Angeles Metropolitan Transit Authority, and (3) the just cited Alameda County and Santa Clara County cases compels the following conclusion: When California state labor legislation is indentical to the National Labor Relations Act, federal decisional law on the subject is an substance and effects the law in California.

Indeed, none of the parties in this case regards this as a

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[18]12 Cal. 3d 608, 617, 87 LRRM 2453 (1974).

[19]54 Cal. 2d 684, 46 LRRM 3065. 3066 (1960).

[20]33 C.A 3d 825, 109 Cal. Rptr. 392, 84 LRRM 2237 (1973)

[21]51 C.A. 3d 255, 124 Cal. Rptr. 115, 90 LRRM 3192 (1975).

matter in dispute. They all rely upon NLRA precedents, though not suprisingly they interpret the precedents in a different manner. Because the courts of our own state have chosen to identify the federal law they will follow in analagous-language unit determination cases, I regard the Pennsylvania and Indiana Public Employment Relations Board cases relied upon by the majority opinion (to the limited extent that they are not distinguishable), as not relevant to the question at hand. Once the federal decisional law is applied, it seems clear that we are obligated to conclude that the Head Custodians in this case are not supervisors within the meaning of the Act.

II

In NLRB v. Swift & Company,[22] the plant clerks alleged to be supervisors told employees where to place and when to move certain products. It was held that those activities were of a "merly routine or clerical nature" within the meaning of Section 2(11) of the National Labor Relations Act.[23] In Teamsters Local 626 (Quality Meat Packing Company), [24] the NLRB decided that an employee who spends practically all of his time doing "rank-and-file work" and whose directions to others employees involved no more than "a more experience employee overseeing and facilitating the work of less experienced employees", is not a supervisor within the meaning of the NLRA. In that case, part of the employees's duties as a Loading Foreman consisted of seeing that other employees properly loaded beef into trucks for delivery. In Laborers and Hod Carriers Local No. 341,[25] the NLRB held that a Labor Foreman wa not a supervisor because he had no authority to hire or fire, played no part in grievance matters, and spent a great portion of his day working and overseeing its performance was held to be routine in nature and one not requiring any significant exercise of independent judgement. In NLRB v. Dunkirk Motor Inn,[26] an Assistant Housekeeper in a motel spent approximately one half of each working day reviewing the manner in which the rooms on one of the motel's two floors had been cleaned by the staff of eight to fourteen maids. The Unites States Court of Appeals said:

The Limited discretion involved in this task is routine in

[22] 240 F. 2d 65, 39 LRRM 2278 (C.A. 9, 1957). Accord, NLRB v. Parma Water Lifter Co., 211 F. 2d 258, 261, 33 LRRM 2810 (C.A. 9, 1954), NLRB v. Osbrink, 218 F. 2d 341, 35 LRRM 2291 (C.A. 9, 1954).

[23] 29 U.S.C. Sec 152 (11).

[24] 224 NLRB No. 40, 92 LRRM 1295 (1976).

[25] 223 NLRB No. 143, 92 LRRM 1112 (1976).

[26] 524 F. 2d 663, 90 LRRM 2961 (C.A. 2, 1975).

nature and insufficient, standing alone to convert an employee into a supervisor... And while /the Assistant Housekeeper/ possessed the 'authority to order maids to take corrective action,' that authority was sparingly exercised. More frequently, Hancock would herself remedy any deficiencies which she found... Furthermore, Hancock lacked the power to discipline an individual maid whose performance was unsatisfactory. Her sole remedy...was to relay the information to the housekeeper... Such referral decision hardly suggest a finding of supervisory status.

In that case, the Court of Appeals reversed a panel of the NLRB on the supervisory status of the Assistant Housekeeper. In so doing, I think the court also effectively overruled Howard Johnson Company,[27] a case relied upon by my colleagues in their majority opinion.[28]

III

In addition to and supplementing the applicable case law, there are compelling policy reasons why this record requires a conclusion tht the Head Custodians in this case are not supervisors within the meaning of the Act. By passing the Act, the Legislature has afforded representation rights which did not exist for education personnel before the Act's passage. In implementing the Legislature's mandate, there should be a presumption in favor of eligibility for inclusion in a unit found to be appropriate. The presumption should stand unless rebutted by a party marking an allegation of ineligibility for unit inclusion. This is consistent with fairness and California law on pleading and the allocation of the burden of proof.

It may be argued that the private and public sectors differ, in that supervisors under our Act are eligible for representation in supervisory units, while private sector supervisors under the NLRA are not eligible for inclusion in units. But this ignores the true status of supervisory units under our Act and our statistics on supervisory units.

Government Code Section 3545(b) prohibits a union from representing a supervisory unit of employees if supervisors in the proposed supervisory unit supervise employees also represented be the same employee organization. Given the limited number of employee organizations operating in the education sector,m it is not at all surprising to me that out of 1,824 requests for recognition and 370 interventions seeking recognition or certification as exclusive representative, and

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[27] 201 NLRB 376, 82 LRRM 1258 (1973).

[28] The facts in Dunkirk and Howard Johnson are similar, the NLRB panel members were the same in both cases, and both cases arose in the same federal judicial circuit.

describing an assortment of proposed negotiating units, only five supervisory units have been proposed and requested by employee organizations. The reality of it all is that it is uncertain that there will ever by very many supervisory units under the Act, so long as teh Act, in this respect, remains in its present form. Accordingly, I see little difference between the effect of a private sector supervisory status and the effect of a supervisory status under our Act. Accordingly, I believe that the Board shoul not find a supervisory status unless the party making that allegation is able to show bya preponderance of the evidence that the test provided in the Act ha been satisfied. Particularly, we ought to take care that employees who work with their hands, performing relatively unskilled work, are not effectively denied rights under the Act solely because their Employer happens to have endowed them with the authority to give routine directions to other employees doing the same or, as in this case, less skilled work.

I agree with the majority conclusion that the secretaries are not supervisors within the meaning of the Act.

Reginald Alleyne,

chairman